

J. K. Guardian Security Services, Inc. and Steven Kissel. Case 13–CA–33699

February 12, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On June 29, 1998, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings,¹ and conclusions and to adopt the recommended Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find no merit in the key arguments made by the Respondent in support of its exceptions. The following examples are not comprehensive, but are representative of the Respondent's inadequate treatment of credited facts.

In seeking to refute the judge's finding that Kissel engaged in union and other protected activities before his discharge on July 26, 1995, the Respondent asserts that Kissel did not file his complaint with the U.S. Department of Labor (DOL) until July 27, 1995, 1 day after his discharge. Although the filing date stamped on the complaint is July 27, the Respondent's argument ignores credited evidence that Kissel held preliminary discussions with the DOL before the formal complaint was filed, and between April and July, discussed his DOL activities with several of the Respondent's supervisors and managers on a number of occasions.

Similarly, in contesting the judge's finding that Kissel solicited proxies for a contract ratification vote before his termination, the Respondent relies on the fact that the Respondent's final wage proposal was not proffered until after the contracting agency (the Federal Protective Service of the U.S. General Services Administration) approved the proposed wage rate, months after Kissel's discharge. This argument ignores the Respondent's own evidence that, by letter of June 8, 1995, it confirmed in a memorandum to the unit employees' union, that it had submitted for approval the wage and other proposals the parties discussed in a meeting on June 6. Thus, by early June, the parties' intentions regarding the tentative collective-bargaining agreement were apparent, and there was sufficient information available for Kissel and others to form an opinion about the agreement.

As a final example, we note that the Respondent continues to insist that Kissel was disciplined and discharged for his repeated uniform and equipment violations. As addressed by the judge, there is substantial doubt on the record that Kissel received the only other prior similar warning purportedly issued on January 5, 1995. In any case, the Respondent has failed to explain, or even to acknowledge, the testimony of Lieutenant Thomas Accardo and Manager Scott Friedrich that it was the Respondent's policy and responsibility to replace worn uniforms and broken equipment that occur through normal wear and tear. The Respondent has not refuted the credited evidence that, consistent with the Respondent's policy, Kissel reported his uniform and equipment problems in February and April 1995, and that the Respondent failed

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J.K. Guardian Services, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Paul Hitterman Esq., and *Peter Hines, Esq.*, for the General Counsel.

Douglas A. Darch, Esq., and *S. Leigh Jeter, Esq.*, for the Respondent.

Steven Kissel, for the Charging Party.

DECISION¹

ALBERT A. METZ, Administrative Law Judge. This case involves the issue of whether the Respondent's discharge of Steven Kissel violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).² On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' arguments, I find that the Respondent has violated the Act as alleged.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Independent Guards and Watchmen of America Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is a contractor with the Federal Government General Services Administration (GSA) designated to provide security at various facilities, including some in Illinois. The Respondent's guard employees working under the Federal contract in Chicago are represented by the Union. The Respondent's supervisory hierarchy at the relevant time consisted of vice president, Mike Malinowski; corporate secretary, Ken Kotz; contract manager, Scott Friederich; Captain Michael Grady; Captain Scott Douglas; and Lieutenant Thomas Accardo.

The Charging Party, Steven Kissel, was employed by the Respondent as a guard in the Chicago, Illinois area. In January 1995 Kissel was allegedly reprimanded by Sergeant Grady for having nonissue rubber grips on his service revolver.³ Friederich asserted that he also spoke to Kissel about the matter. Kissel recalled discussion with Friederich about rubber grips but credibly testified that he did not recall being told they

timely to remedy the problems. Nor has the Respondent claimed that Kissel's uniform and equipment problems were attributable to other than normal wear and tear.

¹ This case was heard at Chicago, Illinois, on December 16–17, 1996, and April 15, 1998. All dates in this decision refer to 1995 unless otherwise stated.

² 29 U.S.C. § 158 (a)(1) and (3).

³ Grady was subsequently promoted to captain and at the time of the hearing was no longer employed by the Respondent. The Respondent sought to obtain his testimony by serving him with a subpoena. Grady refused to honor the subpoena and enforcement proceedings took place in Federal district court. After the enforcement action was successfully concluded, Grady again failed to appear to give testimony. I then declared him "unavailable" under the terms of the Federal Rules of Evidence, and the Respondent proceeded with its case. Fed.R.Evid. 804 and 807.

should be removed. Kissel continued to have the rubber grips on his revolver until shortly before his July discharge. The Respondent said nothing further to Kissel about the grips until the time of his discharge.

In February Kissel notified the Respondent in writing that his issue holster had broken and he was thus wearing his own pistol belt and holster. On April 20, Kissel wrote a note to his supervisor, Captain Douglas,⁴ explaining that he had certain broken equipment (holster, badge, name plates, and nightstick ring) that he was asking be replaced. Kissel also had conversations with Douglas and asked the captain to get a replacement holster but nothing was done at the time in this regard. During early 1995 Kissel also was wearing black uniform pants and not the dark blue trousers that were the standard. Kissel continued to wear this nonstandard equipment and uniform until his discharge on July. The Respondent asserts that it was these uniform and equipment violations that were the sole reason for his discharge.

III. KISSEL'S UNION ACTIVITIES

Kissel was a member of the Union and became dissatisfied with its representation of employees. In approximately March, Kissel was contacted by another guard seeking employees' signatures on a petition to decertify the Union. Kissel told the employee that he would check with the Department of Labor (DOL) about the matter of electing new officers instead of decertifying the Union. Kissel went to the DOL to discuss his belief that the Union had for several years failed to hold elections of officers. Kissel also discussed his contact with the DOL with some of Respondent's supervisory officers.

In late May or early June, the Respondent and the Union began discussions concerning a new collective-bargaining contract. In May, Supervisor Lieutenant Accardo asked Respondent's vice president, Mike Malinowski, if he had begun negotiating a new union contract. Malinowski stated he had and it looked favorable for the Company. In union meetings subsequently held to discuss the contract, Kissel argued for the inclusion and exclusion of certain provisions in the new agreement that contrary to what the Respondent or the Union had been proposing. Kissel was dissatisfied by the response he received from the Union to his views. He then began a campaign to obtain proxies from fellow guards to control their votes over ratification of the new collective-bargaining contract. Kissel again discussed his dissatisfaction with the Union's contract stance and his proxy efforts with some Respondent's supervisory officers.

In June, Lieutenant Accardo was asked by Captain Grady if he knew anything about Kissel and three other guards engaging in an effort to vote out the Union. Accardo said he did not know anything about the matter. Grady said he had been talking to Kissel about the matter and had told him how to go about obtaining proxy votes. Accardo then asked Contract Manager Friederich if he knew about the matter. Friederich acknowledged that he had already learned what was happening.

In early July, Accardo was asked by Friederich if he knew anything about a petition that was being circulated by the employees. Accardo asked what the petition was about and Friederich told him it concerned the Union having a "new election." Accardo said he had not heard anything about it but to ask Captain Grady as he was "helping out the Union."

⁴ Captain Scott Douglas was not called as a witness at the hearing.

IV. KISSEL'S DISCHARGE

In late July, Accardo was in the supervisor's office and picked up the telephone. He overheard a conversation between Captain Grady and Vice President Mike Malinowski concerning Steven Kissel. Malinowski told Grady to make sure he "finds something on Kissel," that he wanted to get rid of him "as soon as possible." Grady assured Malinowski that he would do what he could about Kissel. Malinowski, a shareholder in the Respondent's corporation, did not testify. His absence was not accounted for by the Respondent. Thus, Accardo's testimony that Malinowski wanted to find an excuse to get rid of Kissel is un rebutted. Under the adverse inference rule when a party has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence is unfavorable to the party. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Such an inference is appropriate in this case. I find that, had Malinowski testified, his testimony would have been adverse to the Respondent's assertion that Kissel was ultimately terminated solely because of his violations of the uniform and equipment regulations. *International Automated Machines*, 285 NLRB 1122, 1122-1123 (1987). Respondent's corporate secretary, Ken Kotz, testified that Malinowski did not have anything to do with Kissel's discharge. Considering the Kotz's demeanor and the record as a whole, I do not credit this testimony.⁵

Approximately the next day Grady and Friederich had a meeting with Mike Malinowski. Later that day Grady told Accardo that he "[h]ad a very important mission that he had to take care of." The following day Accardo was in Friederich's office and noticed a disciplinary form containing Kissel's name. He asked Friederich about the form and was told Grady had written up Kissel for not having his duty holster, having unauthorized speed loaders and not having his hat. Accardo asked Friederich why Grady had written Kissel up when he already knew about his "problem" of having broken equipment. Accardo asked if this was the very important mission that Grady was on. Friederich looked at Accardo and shook his head yes and no, and smiled. Later in the day Accardo saw Grady and asked him if Kissel's writeup was the important mission that he was supposed to be on. Grady said it was, that he had to write Kissel up because that was what he was told to do by Malinowski.

On July 25, Captain Grady finally brought a replacement holster for Kissel to wear. Grady inspected Kissel at the same time and wrote him up for the following violations: (1) wearing basket weave leather equipment; (2) wearing a nonregulation security police badge; (3) wearing additional ammunition; (4) no name plate; (5) carrying pepper spray; (6) no hat; (7) wearing a shooting award pin; (8) not having a night stick; and (9) having rubber grips on his revolver.

Kissel testified that he had never been warned about the rubber grips. His badge, name plate, and baton ring had been broken for some time and not replaced by the Respondent even though he had reported their breakage. He was wearing the

⁵ According to Accardo, Malinowski had made known the year before that he did not like Kissel and wanted to get rid of him at some point. Apparently this ill feeling resulted from an unemployment claim that Kissel had filed that Malinowski was involved with during a different period of employment. As noted Malinowski did not testify to clarify this matter. The Respondent did not assert that this ill feeling had anything to do with Kissel's discharge.

same black pants that he had worn for some months because he did not have a pair of blue pants that fit. Kissel signed the writeup prepared for him by Grady. The written reprimand he signed had writing added to it subsequently that Kissel did not see. That writing included a notation: "Suspension pending dismissal per GSS," followed by Grady's initials and the date 7/25/95. Kissel was not suspended on July 25.

The following day, Captain Grady returned to the post and again issued a writeup to Kissel. This time the warning states: (1) rubber grips on revolver; (2) wearing a nonregulation badge; (3) not wearing hat; (4) not carrying baton; (5) wearing black uniform pants; (6) not wearing a name plate; (7) wearing shooting medal; and (8) carrying extra ammunition.

Kissel's testimony refutes much of the July 26 writeup. Kissel stated that he had replaced his holster with that brought to him by Grady the day before and was not wearing his own leather. Kissel said he had replaced the rubber grips on his revolver with the standard issue grips. He admitted that he did not have on a different badge, name plate, nor was he carrying his night stick in a belt ring. All of these items were still broken and had not been replaced by the Respondent. He was wearing black pants, but as noted had been told they were unacceptable before July 25, even though he had worn them for some time.

Grady received a call on July 26 that he was to report to Friederich the following morning before going to his post. Kissel met with Friederich as directed at the latter's office. Kissel was not dressed for duty at the time but was dressed in the black uniform pants he had worn before. Kissel testified that this was the only pair of uniform pants he had to wear. Friederich told Kissel he was being suspended for his failure to heed the warnings he had received. Friederich then received a telephone call from Kotz who told him to discharge Kissel. Friederich then informed Kissel that he was being terminated.

Analysis

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

The Government has shown that Kissel was engaged in union activity at the time of his discharge and that some of the Respondent's supervisors had knowledge of that activity. The uncontroverted evidence shows Malinowski, contemporaneous with Kissel's union activities, directed that Grady find a reason to discharge Kissel. Such a command is consistent with a desire

by the Respondent to rid itself of an employee who was seeking a tougher stance by his union in collective bargaining with the Respondent. I find that the Government has met its initial burden of establishing that a motivation for Kissel's discharge was his union activity. The Respondent's defense centers on the fact that Kissel had ignored equipment and uniform regulations. This defense, however, does not fully explain why Kissel's lack of regulation gear had not been an issue for several months before he engaged in his efforts to improve the union's contract proposals. Importantly the Respondent did not call Malinowski as a witness to deny or explain his order that Grady find some excuse to get rid of Kissel. I infer from the record as a whole that the directive was to find a pretext to discharge Kissel and that, at least in part, motivated by Kissel's union activity. I therefore, find that the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Kissel. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. J. K. Guardian Security Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Independent Guards and Watchmen of America Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, J. K. Guardian Security Services, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engaged in union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Steven Kissel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Steven Kissel whole for any loss of earnings and other benefits suffered as a result his discharge, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the Steven Kissel's discharge, and within 3 days thereafter notify him in writing that this has been

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

done and that the written warning, suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 27, 1995. *Excel Container*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX NOTICE TO EMPLOYEES

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they engage in union activities involving the Independent Guards and Watchmen of America Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Steven Kissel full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Steven Kissel whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Steven Kissel, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the written warning, suspension and discharge will not be used against him in any way.

J. K. GUARDIAN SECURITY SERVICES, INC.